

Essential Evidentiary Foundations for the Admission and Exclusion of Proof during Trial AND Fundamental Skills: Working with Documents



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Is this how we feel in most criminal trials?



- ❧ "I object, Your Honor. This trial is a travesty of a mockery of a sham of a travesty of two mockeries of a sham! " Woody Allen, *Bananas* (1971)
- ❧ And an objection to cover all bases:
- ❧ "I object. The exhibit is confusing, unfairly prejudicial, misleading, irrelevant, barred by the exclusionary rule, and not a fair and accurate representation of what it purports to represent."

Abuse of Discretion



- ❧ Why is it so important to admit or exclude evidence?
- ❧ Standard of review on appeal is “*abuse of discretion*”
- ❧ Very difficult to overcome
- ❧ Must show “prejudice” and harm or that the ruling adversely affects a substantial right of a party. The standard of review governing the admission or exclusion of evidence is abuse of discretion. *Catchings v. State*, 39 So. 3d 943, 950 (¶29) (Miss. Ct. App. 2009) (citing *Williams v. State*, 991 So. 2d 593, 597 (¶8) (Miss. 2008)). A circuit court's decision to admit or exclude evidence will only be reversed if it "result[s] in prejudice and harm or adversely affect[s] a substantial right of a party." *Id.* at 951 (¶34) (quoting *Hammons v. State*, 918 So. 2d 62, 65 (¶10))

M.R.E. Authentication, et al. of Documents and things



- œ M.R.E. 901-Authentication & Identification. The proponent must produce evidence *sufficient* to support a finding that the item is what the proponent claims it is. (See the examples in Rules).
- œ M.R.E. 902-Self Authenticating. (Pay close attention to what is required)
- œ M.R.E. 1001 & 1002. “An original writing, recording or photograph is required in order to prove its contents unless otherwise provided by law.”
but.....

Continued...



œ M.R.E. 1003-" A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate."

M.R.E. 1004



- ❧ RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if: (1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith; or (2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure; or (3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, he was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and he does not produce the original at the hearing; or (4) Collateral Matters. The writing, recording, or photograph is not closely related to a controlling issue.

M.R.E. 1005



❧ RULE 1005. PUBLIC RECORDS The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, **may be proved by a copy, certified as correct in accordance with rule 902 or testified to be correct by a witness who has compared it with the original.** If a copy which complies with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

M.R.E. 1006



❧ RULE 1006. SUMMARIES The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

M.R.E. 1007



❧ RULE 1007. TESTIMONY OR WRITTEN
ADMISSION OF PARTY Contents of writings,
recordings, or photographs may be proved by the
testimony or deposition of the party against whom
offered or by his written admission, without
accounting for the nonproduction of the original.

M.R.E. 1008



❧ RULE 1008. FUNCTIONS OF COURT AND JURY When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of rule 104. However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) **whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.**

Some Sports Coach said?

- ❧ “If you want to play the game, you had better know the rules of the game.
- ❧ And if you want your opponent to play by the rules, you'll not
- ❧ only have to recognize the infraction, you'll have to complain to the referee and tell him/her exactly which rule was violated by the opposition.”

6 Things To Consider with Tangible, Documentary or Electronic Evidence



- ❧ 1. Is the Evidence Relevant under M.R.E. 401? Conversely, does it pass M.R.E. 403?
- ❧ 2. How will you prove the Authenticity or Identification of documents? Who is the best or *necessary* witness?
- ❧ 3. Is it Hearsay and if it is, does it satisfy an exception?
- ❧ 4. If the evidence is a writing, recording or photograph is it offered to prove the content? If so, may have to have the original or explain why you do not?
- ❧ 5. Is the document subject to a privilege?
- ❧ 6. Does the document cause confusion of the issues, misleading jury, undue delay, waste of time, needless presentation, or cumulative.

Possible objections to Documents



- ❧ 1. Not relevant or irrelevant.
- ❧ 2. Not properly authenticated, no foundation or improper foundation.
- ❧ 3. Improper or incomplete copy. M.R.E. 106.
- ❧ 4. **Part of the evidence in the document is inadmissible hearsay and/or lacks trustworthiness.
- ❧ 5. Contains inadmissible lay or opinion evidence. (reports of law enforcement).

Possible objections continued:



- ❧ 6. Confusing, misleading or waste of time.
- ❧ 7. M.R.E. 403, prejudice outweighs probative value.
- ❧ 8. If self-authenticating, are the self-authenticating seals, attestations correct?
- ❧ 9. Have you been provided the underlying data for a summary witness. M.R.E. 705

Practice Tips for Making Objections

- ❧ 1. Try Motions in *Limine*
- ❧ 2. Be careful when you make “running objections.”
Get specific rulings from the Court to the exact line of inquiry where you want a continuing objection.
- ❧ 3. Know MRE 1006 (summary rule)
- ❧ 4. “Pitting one witness against each other” Rule 608
- ❧ 5. All evidence must be filtered through M.R.E. 403
- ❧ 6. Offers of Proof: Have witness ready in case
opponent objects to you simply making a statement.
103(b)

More objection tips



- ❧ 7. Object to opposing party releasing a subpoenaed witness. Only court can do this.
- ❧ 8. Dying Declarations. Was it “testimonial”?
- ❧ 9. Leading questions usually begin with “So” or “Would you say”.
- ❧ 10. Questions which call for speculation usually contain “could you”, “what if”, “do you suppose”.

Meeting and Defeating Objections



- ❧ 1. 404 (b) lists only examples of uncharged conduct.
- ❧ 2. Business records: make sure all records are within the knowledge of the records custodian
- ❧ 3. Statements to doctors also means to the “litigation” doctor.
- ❧ 4. Adoptive admissions: Defendant doesn’t have to be present when they are made.

Meeting and Defeating Objections



- ❧ 5. 806 allows you to impeach a hearsay declarant as if that person had testified.
- ❧ 6. If you introduce a “summary of voluminous writings” make sure you make them available to opposing counsel. Use Self authenticating business records certificate.
- ❧ 7. If opposing counsel wishes to make an offer of proof, demand it be in “question and answer” form.

The Best Evidence Rule



- ❧ OBJECTION: Your Honor, this is not the best evidence. The original document is the best evidence.”
- ❧ DISCUSSION: There are three aspects to the “Best Evidence Rule.” The first aspect is the one most often invoked today: ordinarily a non-expert witness is not allowed to describe what is in a document without the document itself being introduced into evidence. Put the document into evidence first, then have the lay witness talk about what is in it.

Best Evidence Rule

Continued...



- ✧ The second aspect is requiring the original document to be introduced into evidence instead of a copy — if the original is available. The original is not available if a search for it did not find the original, or if it is in the hands of an adversary, or it is beyond the jurisdiction of the court to subpoena. Requiring the original document (the best evidence) to be available for examination insures that nothing has been altered in any way. The best evidence rule arose during the past centuries when a copy was made by hand, often by persons not trained to be careful and often not exact as to each word. Parties and courts sensibly assumed that, if the original was not produced, there was a good chance of a scrivener's error (or fraud if the copy were handwritten by a party to the litigation). Now that "copy" usually means a photocopy, or an automatic printout of electronic data entries, the chance of a copy containing a mechanical error is slight. Courts are reluctant to require needless effort to find the original if there is no dispute about the fairness and adequacy of a photocopy. The court has discretion to allow a copy to be used instead of the original.

Best Evidence continued...



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Best Evidence Rule still continued...



- ❧ The third aspect of the best evidence rule is that in past centuries, compilations of documents only involved a few documents. Hence, at one time, the original documents had to be offered into evidence, not someone's summarization of the decrements. Today, compilations or summaries of voluminous records (typical in printouts of individual entries of electronic entries in the format of a report of all the entries) present the problem of perhaps thousands of documents or data entries to be considered by the trier of fact. Modern evidence law has solved the problem by providing that:
- ❧ The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Game Time: Admissible or Not?

Problem 1.



- ❧ John Smith is on trial for murder. His defense is Alibi. The Coroner's Report is a document filed with the State of Mississippi and done under authority of law. It is stipulated to be "true and correct" report that is on file with the State. John Smith's lawyer has asked to admit the Report under M.R.E. 803(8)(iii), Public Records and Reports. The accused wants to use the time of death in the report because that time of death coincides with his alibi.
- ❧ Admissible or not and why?

Answer 1.



❧ *Jones v. State*, 918 So. 2d 1220 (Miss. Sp. Ct. 2005).
Time of death not admissible. The coroner did not have a medical degree. It is clear the coroner relied upon hearsay in his report and he had no manner to determine the time of death. The statement lacked “trustworthiness.”

Problem 2:



⌘ Accused on trial for aggravated assault. During the testimony of a Deputy, the Deputy was asked who the victim said had shot him. The Deputy could not remember and referred to his report. (Refreshing recollection). He then gave the accused's name. The defense offered the entire report into evidence under M.R.E. 803(6), stating it was a "record of a regularly conducted activity." (Did not cite 803(8)). Should the report be admitted into evidence, and why or why not?

Answer to Problem 2:



❧ *Bingham v. State*, 723 So. 2d 1189 (COA 1998). Entire report not admissible. Factual statements and information would be admissible, however statements from other parties, witnesses, bystanders, ect., would be hearsay and lack the safeguards outlines in M.R.E. 801.

Problem 3:



⌘ Accused on trial for robbery. During the trial the Court allowed into evidence documents which consisted of the search warrant and underlying affidavit. Admissible or not and why?

Answer to problem 3:



❧ *Holt v. State*, 348 So. 2d 434 (Sp.Ct. 1977). Not admissible. They contained inadmissible hearsay and were “prejudicial.”

Problem 4:



- ❧ Defendant convicted of raping his 6 year old niece.
- ❧ A hospital employee used an anatomic drawing to ask the child where she was injured. During trial an anatomic drawing was introduced and the employee testified it was the “most important document in her file.” The Defense objected that the document (drawing) was hearsay. Admitted or not and why?

Answer to Problem 4:



⌘ *Young v. State*, 679 So. 2d 198 (SCT 1996). Admissible under M.R.E. 803(25)

Problem 5



⌘ Defendant on trial. After being convicted a habitual sentencing hearing was held. One Miss. conviction was introduced and to prove the second conviction the State relied upon an exhibit prepared by the Memphis Police Department which detailed his arrest and a F.B.I. document which reflected a conviction. The State also offered a letter from a Florida Corrections supervisor which showed the defendant had a burglary conviction. It was attested by a notary public. Are these documents properly authenticated under M.R.E. 901?

Answer to Problem 5:



❧ *Cox v. State*, 586 So. 2d 761 (M.S.C. 1991). Good analysis of authentication and what it means including self-authenticating. Not admissible. The Tennessee documents were not properly certified as the copies were only notarized. The Florida letter was not a *public document* and some were copies of copies. None were certified copies.

Problem 6:



⌘ Defendant was tried for forcible rape and convicted. During the sentencing hearing the State used a Texas conviction certified according to the Acts of Congress. Defendant objection stating they were “hearsay” Properly admitted?

Answer to Problem 6:



- ❧ Taggart v. State, 957 So. 2d 981 (S.C.T. 2007).
Admissible. The documents were hearsay but they fell within the exception under 803(8). This case contains more good analysis on authentication.
- ❧ This was a trick question it was so easy.

Problem 7:



❧ Defendant charged with 2 counts of gratifying lust and 1 count of statutory rape. The defendant attempted to use social media posts to support his defense that the victim was lying and the alleged sexual acts never took place. The State filed a motion to prohibit the social media posts stating they violated M.R.E. 412 and were not authenticated under 901. The trial court denied the defense the right to use any of the evidence, stating, “they are not relevant...there’s no way to authenticate. Would not be reliable....” Should the Court have allowed the defense the opportunity to try and authenticate or is the social media taboo?

Answer to Problem 7:

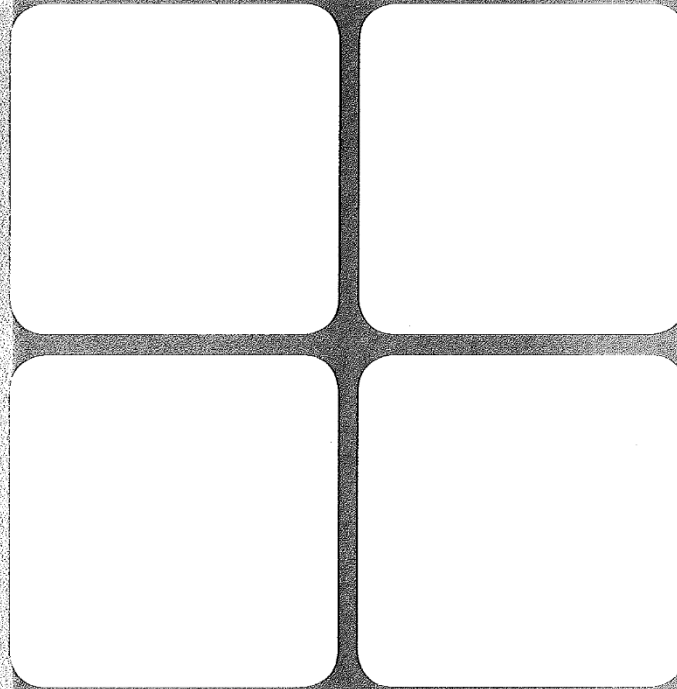


❧ *White v. State*, 2017 Miss. App. LEXIS 358 (Miss. Ct. App., June 13, 2017), cert. denied. Trial court erred. The Court cited to *Smith v. State*, 136 So. 3d 424 (Miss. 2014) (Smith is a must-read) which holds a party must make a prima facie showing of authenticity and then the evidence goes to the jury to determine the authenticity. Electronic evidence may be **authenticated** by traditional mean....but for social media 'something more' than the account owner's name and photograph is required to authenticate the posts.

Continued to 7:



✧ The *Stored Communications Act* does not give a defendant authority to subpoena social media but a prosecutor may issue subpoenas. Some lawyers have filed motions asking Court to order the prosecutors to subpoenas citing various constitutional reasons. Courts across the country are inconsistent on the authority to order prosecutors to do this for the defense. In civil cases courts have order parties to give the other side access.



Evidentiary Foundations

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